Supreme Court, U.S.
FILED

114 (D) 08-898 JAN 13 2009

OFFICE OF THE CLERK

No. _____

# In The
# Supreme Court of the United States

MARK C. SHAW,

*Petitioner,*

v.

RICHARD C. PFEIFFER, JR. AND MITCHELL J. BROWN,

*Respondents.*

*On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit*

## PETITION FOR WRIT OF CERTIORARI

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January 13, 2009

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## QUESTION PRESENTED

Whether the appellate court erroneously affirmed dismissal of Mr. Shaw's Complaint against the City of Columbus, Ohio for its unconstitutional policy in violation of Garrity v. New Jersey, 385 U.S. 493 (1967), of compelling public employees to give testimony in administrative proceedings that is subsequently utilized in criminal prosecutions, for failure to plead the specific policy, custom or practice that violated Petitioner's constitutional right against self incrimination with the requisite specificity. Also presented is the question of whether a complaint that alleges government liability under Monell v. Department of Social Services, 436 U.S. 658 (1978) and states that a municipal employee was compelled under a municipal administrative order to testify in an administrative proceeding and that this coerced testimony was used in a subsequent criminal prosecution, is sufficient to state a claim under 42 U.S.C. §1983.

## PARTIES

Petitioner, Mark C. Shaw, is a resident of Franklin County, Ohio and a former employee of the City of Columbus, Ohio Division of Police, having formerly been employed as a Criminalist II with responsibility, *inter alia*, for the conducting of various laboratory analyses including the testing of blood and urine samples for the presence of alcohol and controlled substances.

Respondent, Richard C. Pfeiffer, Jr. is the current City Attorney for the City of Columbus. Respondent Mitchell J. Brown is the current Director of the Department of Public Safety for the City of Columbus.

For purposes of this Petition it is only alleged that Respondents were sued below in the official capacities.

## TABLE OF CONTENTS

QUESTION PRESENTED ..... i

PARTIES ..... ii

TABLE OF CONTENTS ..... iii

TABLE OF AUTHORITIES ..... v

OPINIONS BELOW ..... 1

JURISDICTION ..... 1

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED ..... 1

STATEMENT OF THE CASE ..... 2

A. STATEMENT OF FACTS ..... 2

B. COURSE OF PROCEEDINGS ..... 8

REASON FOR GRANTING THE PETITION ... 13

CONCLUSION ..... 15

APPENDIX

Appendix A: Sixth Circuit Opinion, dated Spetember 23, 2008 ..... 1a

Appendix B: District Cout Order, dated July 25, 2007 ..... 4a

Appendix C: District Court Order, dated November 22, 2006 ..... 7a

Appendix D: District Court Opinion and Order, dated September 7, 2006 ..... 9a

Appendix E: Sixth Circuit Order, dated October 15, 2008 ..... 29a

Appendix F: District Court Notice of Appeal, dated July 26, 2007 ..... 31a

Appendix G: Sixth Circuit Mandate, dated October 28, 2008 ..... 33a

## TABLE OF AUTHORITIES

**Cases**

Garrity v. New Jersey,
385 U.S. 493 (1967) ..... i, 8, 11, 13

Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit,
507 U.S. 163 (1993) ..... 14

McNabola v. Chicago Transit Authority,
10 F.3d 501 (7th Cir. 1993) ..... 15

Monell v. Department of Social Services,
436 U.S. 658 (1978) ..... i, 14

Oviatt v. Pearce,
954 F.2d 1470 (9th Cir. 1992) ..... 15

Shaw v. Brown, Case No. 2:01-cv-00364,
United States District Court for the Southern District of Ohio ..... 6, 8

**Constitution**

U.S. Const. amend V ..... 1
U.S. Const. amend XIV ..... 2

**Statutes**

28 U.S.C. §1254 ..... 1
28 U.S.C. §1257 ..... 2
42 U.S.C. §1983 ..... 15
Ohio Rev. Code § 2921.44(E) ..... 4

# PETITION FOR A WRIT OF CERTIORARI

Mark C. Shaw respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit in this case.

## OPINIONS BELOW

September 7, 2006 Opinion of United States District Court, Southern District of Ohio granting Defendants' Motion for Summary Judgment.

September 23, 2008 Opinion of United States Court of Appeals for the Sixth Circuit affirming district court.

October 15, 2008 Order of United States Court of Appeals for the Sixth Circuit denying rehearing.

## JURISDICTION

The judgment of the Sixth Circuit was entered on September 23, 2008. A Motion for the Reconsideration was denied on October 15, 2008. The jurisdiction of this Court rests on 28 U.S.C. §1254.

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

**Amendment 5 - Trial and Punishment, Compensation for Takings.**

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury,

except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

**Amendment 14 - Citizenship Rights.**

1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

* * *

## STATEMENT OF THE CASE

### A. STATEMENT OF FACTS

Review is requested of a decision by the United States Court of Appeals for the Sixth Circuit that affirmed the granting of a motion for summary judgment by the United States District Court of Ohio, Eastern Division dismissing Petitioner's claim that his privilege against self incrimination was violated by the

City of Columbus, Ohio's use in a criminal proceeding of testimony Petitioner was compelled by municipal regulation to give in an administrative proceeding.

Petitioner, Mark C. Shaw is a resident of Franklin County, Ohio and a former employee of the City of Columbus, Ohio Division of Police, having formerly been employed as a Criminalist II with responsibility, *inter alia*, for the conducting of various laboratory analyses including the testing of blood and urine samples for the presence of alcohol and controlled substances.

Respondent Richard C. Pfeiffer, Jr., is the duly elected city attorney for the City of Columbus, Ohio. Columbus is an Ohio municipal corporation. Mr. Pfeiffer or his predecessor had policy and supervisory responsibility for the criminal prosecution of individuals alleged to have committed offenses proscribed by the codified statutes and criminal provisions of the City of Columbus, Ohio.

Respondent, Mitchell J. Brown, is the Safety Director for the City of Columbus, Ohio, an Ohio municipal corporation. Respondent Brown had policy and supervisory responsibility for management of the Columbus, Ohio Division of Police, to include the enforcement of disciplinary policies when necessary, against Division of Police employees.

On September 22, 2003, at the behest of Respondent Brown, while acting in his capacity as Columbus Safety Director, Respondent Pfeiffer's predecessor, for whose acts he is liable, while acting in the capacity of Columbus City Attorney, caused, authorized and directed the criminal prosecution of

Petitioner, for alleged violation of the provisions of § 2921.44(E), Ohio Revised Code, "Dereliction of Duty."

Upon Respondent Brown's directive, request or instruction Respondent Pfeiffer caused, approved, authorized, or consented to the commencement of a criminal proceeding against Petitioner for eight separate alleged instances of violation of §2921.44(E), Ohio Revised Code, "Dereliction of Duty" for acts ranging from May 25, 2000 to September 20, 2000[1].

The prosecution of Petitioner for these alleged offenses violated his privilege against self incrimination secured by the Fifth Amendment to the United States Constitution and made applicable to the states by the Fourteenth Amendment for the reason, on April 30, 2001, during an administrative hearing conducted by the City's Division of Police, at Respondent Brown's direction, to determine if Petitioner should be terminated from his employment as a criminalist within the Division of Police, for conduct that formed, in part, elements of the 2003

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[1] The Specific charge against Petitioner was:

Mark Shaw, a public servant, to wit: a public servant employed by the City of Columbus Division of Police Crime Laboratory as a Criminalist II did recklessly fail to perform a duty expressly imposed by law with respect to the public servant's office, to wit: while holding a laboratory technician's/director's permit as described in OAC 3701-53-07(A) did fail to conduct evidential tests of biological fluids for alcohol levels in accordance with the laboratory's written procedure manual in violation of OAC 3701-53-06(C), to wit: reported alcohol level results for blood or urine samples where one or more quality control samples used in testing had a test result more than outside the known value for the quality control sample....in violation of section 2921.44(E)

criminal prosecution, Petitioner was, pursuant to Columbus Ohio, Administrative Order IAB# 00-101[2]

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[2] Administrative Order IAB #00-101 states:

**Administrative Order**

You are about to be questioned as part of an official administrative investigation being conducted by the Columbus Division of Police Internal Affairs Bureau. The purpose of this interview is to collect facts and information for the chain of commence to it may determine whether a violation of the Rules of Conduct has occurred. The answers you furnish may be used in future disciplinary proceedings brought against you or another employee.

You will be asked specific questions which will relate to the basic facts of the incident under investigation. If, during the interview, other information is developed which could lead to additional allegations against a Division of Police employee, the scope of the questioning may be expanded to include information relevant to the newly realized allegations.

Because this is administrative, not criminal in nature, the information gained from this interview may not be used against you in any criminal proceeding.

You are hereby **ordered** and required to fully and truthfully answer all questions asked of you in this interview. You failure to comply with this order constitutes your being in violation of the Rules of Conduct of the Division of Police.

**Rule of Conduct 1.07**, provides, in pertinent part:

Division personnel are to obey any lawful order of a superior or any order relayed from a superior officer by an officer of the same or lesser rank.

compelled to give testimony that was later utilized in his criminal prosecution. Enforcement of this administrative order is a routine procedure in disciplinary hearings within the Columbus Ohio Division of Police.

Prior to providing testimony under direct orders from Columbus, Ohio officials under the authority of Administrative Order IAB #00-101, Petitioner commenced an action in, Shaw v. Brown, Case No. 2:01-cv-00364, United States District Court for the Southern District of Ohio, requesting an order that would stay administrative proceedings against him pending completion of the ongoing criminal investigation for alleged conduct arising from the same nucleus of operative facts upon which administrative proceedings were based. In response to Petitioner's concerns about self incrimination in the context of these parallel civil and criminal proceedings, the City provided Petitioner with a so-called Garrity[3] warning.

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Rule of Conduct 1. 15(5) requires that Division personnel be truthful at all times.

I have received the foregoing **order**.
s/ Mark Shaw 10/10/00 1:47PM
Witnessed by: s/_____
(Emphasis added.)

[3] The Garrity warning provided:

**GARRITY WARNING FOR THE ADMINISTRATIVE HEARING OF MARK SHAW**

I wish to advise you that you are present at this administrative hearing pursuant to disciplinary charges brought against you as a result of an official investigation of the City of Columbus,

Despite the assurances from City officials that Petitioner's testimony in the administrative hearing would not, in any manner form the basis for a criminal prosecution, the statements elicited from him under Administrative Order IAB #00-101 were utilized in a criminal prosecution against him. Following a trial, the criminal charges against Petitioner were dismissed under Ohio Rule of Criminal Procedure 29, on grounds that the provisions of the Columbus Division of Police manual upon which the written laboratory procedures that it was alleged that Petitioner had violated, do not set forth a precise and specific duty that would give a person of ordinary and reasonable intelligence notice of what conduct is proscribed by those provisions. Despite this dismissal, Petitioner's prosecution was

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Division of Police. You will not be asked any questions but have a right to give a statement specially directed and narrowly related to those charges which involve the revocation of your permit to test substances for drugs and/or controlled substances issued by the Ohio Department of Health. If your statement goes beyond this scope, you do so at your own peril. You are entitled to all the rights and privileges guaranteed by the laws and Constitution of this State, and the Constitution of the United States, including the right not to be compelled to incriminate yourself and to have an attorney of your choice present during this hearing. Understand that any statement you make will not be used against you in a criminal proceeding if you limit any statement to the above stated parameters.

I further wish to advise you that any statement you give which is specifically directed and narrowly related to the revocation of your permit to test substances for drugs and/or controlled substances issued by the Ohio Department of Health may be used to determine discipline in this administrative hearing.
s/Mark C. Shaw 04/30/2001

(Emphasis added.)

based, in part, on the testimony he was compelled under administrative order to provide.

At the time that the criminal investigation against Petitioner was commenced by the City of Columbus, he was in excellent health. Since the occurrence of the events described above, that is a criminal investigation, wrongful termination from his employment, and wrongful malicious criminal prosecution, Petitioner has suffered a stroke and other debilitating physical and emotional problems. The actions of Respondents taken pursuant to Administrative Order #IAB #00-101, violated Petitioner's privilege against self-incrimination, and were contrary to the procedure established under Garrity.

## B. COURSE OF PROCEEDINGS

Petitioner initially moved for an order staying the administrative proceeding against him pending completion of the criminal investigation. See, Shaw v. Brown, S.D. Ohio, Case No. 2:01-cv-00364. Upon receiving assurances that Garrity v. United States would be observed, Petitioner participated in administrative proceedings commencing on April 30, 2001. Upon completion of the administrative hearing, Petitioner was terminated from employment and criminal charges were brought against him.

On September 23, 2003, the criminal charges against Petitioner were dismissed under Ohio Rule of Criminal Procedure 29, on grounds that the provisions of the Columbus Division of Police manuals upon which the written laboratory procedures that it was alleged that Petitioner had violated, do not set forth a

precise and specific duty that would give a person or ordinary and reasonable intelligence notice of what conduct is proscribed by those provisions. Following dismissal of the criminal case Petitioner commenced an action in United States District Court for violation of his privilege against self incrimination.

The original Complaint states the following very clearly:

> 7. On September 22, 2003, at the behest of Defendant Brown, while acting in his capacity as Columbus Safety Director, Defendant Pfeiffer while acting in his capacity as Columbus City Attorney, caused, authorized and directed the criminal prosecution of Mark C. Shaw, for alleged violation of the provisions of § 2921.44(E), Ohio Revised Code, "Dereliction of Duty."
>
> 8. Upon Defendant Brown's directive, request or instruction Defendant Pfeiffer caused, approved, authorized, or consented to the commencement of a criminal proceeding against Mr. Shaw for eight separate alleged instances of violation of § 2921.44(E), Ohio Revised Code, "Dereliction of Duty" for acts ranging from May 25, 2000 to September 20, 2000.
>
> 9. The prosecution of Mr. Shaw for these alleged offenses violated his privilege against self incrimination secured by the Fifth Amendment to the United States Constitution and made applicable to the states by the Fourteenth Amendment for the

reason, on April 30, 2001, during an administrative hearing conducted by the City's Division of Police, at Defendant Brown's direction, to determine if Mr. Shaw should be terminated from his employment as a criminalist within the Division of Police, for conduct that formed, in part, elements of the 2003 criminal prosecution, Mr. Shaw was compelled to give testimony that was later utilized in his criminal prosecution. See, Exhibit C for Garrity Warning and for a copy of earlier Complaint seeking to stay administrative proceedings pending resolution of criminal investigation against Mr. Shaw.

10. On September 23, 2003, following trial, the criminal changes against Mr. Shaw were dismissed under Ohio Rule of Criminal Procedure 29, on grounds that the provisions of the Columbus Division of Police manuals upon which the written laboratory procedures that it was alleged that Mr. Shaw had violated, do not set forth a precise and specific duty that would give a person of ordinary and reasonable intelligence notice of what conduct is proscribed by those provisions. See, Exhibit D for journal entry dismissing criminal prosecution of Mr. Shaw...

12. The conduct of Defendants described above deprived Mr. Shaw of his privilege against self-incrimination.

(Emphasis added). Upon motion by Respondent for summary judgment the Complaint was dismissed for failure to identify a specific policy or custom that violated Petitioner's constitutional rights. Dismissal was affirmed by the Circuit Panel.

Contrary to the findings of both the District Court and Circuit Panel, Petitioner clearly states in his Complaint that he was aggrieved by the City's policy of compelling persons to participate in administrative termination proceedings while simultaneously being subjected to criminal prosecution. The exhibits to the original complaint included copies of the criminal complaints against Petitioner, correspondence from the City indicating he was required to participate in the administrative hearing and a Garrity warning. Also attached to the Complaint was Petitioner's affidavit in form of a verified complaint filed on April 1, 2001, where Petitioner makes the following statement:

> 3. Mitchell J. Brown has under color of state law ordered Plaintiff Shaw to appear at a civil disciplinary hearing at a time when a parallel criminal investigation commenced by City of Columbus is pending against Mr. Shaw. See, Exhibit A. Both the civil and criminal investigations have been commenced by the City of Columbus and, on information and belief, both investigations concern the manner in which Mr. Shaw performed his duties at the Columbus Police Crime Lab as a Criminalist II. The hearing in question has been scheduled for April 30, 2001, at 8:30 a.m., having been rescheduled from April 23, 2001.

4. It is violative of Mr. Shaw's privilege against self incrimination for the City of Columbus, Ohio, its officers and agents, to compel Mr. Shaw to appear at a civil disciplinary hearing to defend himself during the pendency of a criminal investigation commenced by the City into the same conduct that gives rise to the civil proceeding. See, Campbell v. Eastland 307 F. 2d 478, 487 (5th Cir. 1962) and United States v. Mellon Bank, N.A. 545 F. 2d. 869, 873 (3rd Cir. 1976). The City has failed to inform Mr. Shaw of the precise scope of the criminal investigation. This failure subjects Mr. Shaw to the risk of self-incrimination in violation of the Fifth Amendment of the Constitution of the United States if he testifies during the civil matter. See, Exhibit B.

5. By reason of parallel civil and criminal proceedings, Mr. Shaw is faced with an imminent risk of irreparable harm if he is required to participate in the disciplinary hearing scheduled for 8:30 a.m., April 30, 2001.

6. Mr. Shaw has requested through counsel that the disciplinary hearing be stayed pending resolution of the criminal investigation. See Exhibit C.

7. Defendants have refused to grant the requested stay. See, Exhibit D.

8. In order to avoid violation of Mr. Shaw's privilege against self-incrimination and the intervention of irreparable harm, Mr. Shaw requests an order with temporary restraint staying the disciplinary hearing scheduled in this action for 8:30 a.m., April 30, 2001, pending a hearing on the Motion for a Preliminary Injunction.

Respondent moved for summary judgment on grounds that Mr. Shaw's Complaint failed to allege a specific policy or custom of the City of Columbus that resulted in violation of Mr. Shaw's constitutional rights. The United States Court of Appeals, without the benefit of oral argument, affirmed the district court's decision.

## REASON FOR GRANTING THE PETITION

Certiorari should be granted for the reason this petition presents a clear case of the blatant violation by the City of Columbus, Ohio of the rule set forth in Garrity v. United States, 385 U.S. 493 (1967). The Complaint here stated very clearly that Petitioner alleged that his constitutional rights were violated by the City's requirement compelling him to respond to questions during an internal police department investigation and later using the involuntary testimony as a basis for subsequent criminal charges.

There is no uncertainty concerning the operation of the Garrity rule. Both the district court and the court of appeals clearly erred when they concluded that Petitioner did not identify a specific policy or custom. The courts below ignored the plain allegations of the Complaint and employed a heightened pleading

requirement instead of the clear allegations that were pleaded.

In Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit, 507 U.S. 163 (1993), this court unanimously rejected the "heightened pleading standard" in cases alleging municipal liability. The Court held that the lower court had erroneously upheld the dismissal of a complaint against a governmental entity for failure to plead with the requisite specificity. While leaving open the question of "whether our qualified immunity jurisprudence would require a heighted pleading in cased involving individual government officials, this court refused to equate a municipality's freedom from respondent superior liability with immunity from suit. Finding it "impossible to square the 'heightened pleading requirement'...with the liberal system of 'notice pleading' set up by the Federal Rules[,]"

While the clearest case for government liability under Monell v. Department of Social Services, 436 U.S. 658 (1978), is a case like Monell itself, where an unconstitutional policy statement, ordinance, regulation, or decision is formally adopted and promulgated by the governing body itself or a department or agency thereof, Monell allows the imposition of government liability not only when the challenged conduct executes or implements a formally adopted policy, but also when that conduct reflects "practices of state officials so permanent and well settled as to constitute a 'custom or usage' with the force of law. Liability is attributed to the municipality in custom-type cases through policy maker's actual or constructive knowledge of an acquiescence in the unconstitutional custom or practice. (See, e.g.,

McNabola v. Chicago Transit Authority, 10 F.3d 501, 511 (7th Cir. 1993) (A municipal 'custom' may be established by proof of the knowledge of policy making officials and their acquiescence in the established practice").) Acts of omission, as well as commission, may serve as the predicate for a finding of unconstitutional policy or custom. (See e.g., Oviatt v. Pearce, 954 F.2d 1470, 1477 (9th Cir. 1992) (holding that "[t]he decision not to take any action to alleviate the problem of detecting missed arraignments constitutes a policy for purposes of §1983 municipal liability").)

Here, the Complaint states very clearly that Petitioner was injured by the practice of compelling public employees to testify in administrative proceedings and then using that testimony in a subsequent criminal prosecution. The conclusion that a policy or custom was not articulated is erroneous and should be reversed.

## CONCLUSION

For the above reasons, the Court of Appeals should be reversed and this matter remanded to the district court for trial.

Respectfully submitted,

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*Counsel for Petitioner Mark Shaw*

January 13, 2009

# APPENDIX

## APPENDIX A

NOT RECOMMENDED FOR PUBLICATION

**UNITED STATES COURT OF APPEALS**
**FOR THE SIXTH CIRCUIT**

**No. 07-3997**

**[Filed September 23, 2008]**

| | |
|---|---|
| MARK C. SHAW, | ) |
| | ) |
| Plaintiff-Appellee, | ) |
| | ) |
| v. | ) |
| | ) |
| RICHARD C. PFEIFFER, JR. et al., | ) |
| | ) |
| Defendants-Appellants. | ) |
| | ) |

ON APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF OHIO

**OPINION**

**Before: DAUGHTREY and GILMAN, Circuit Judges; and MILLS, District Judge.***

**RONALD LEE GILMAN, Circuit Judge.** Mark C. Shaw was fired from his position as a Criminalist for the City of Columbus Division of Police and prosecuted for dereliction of duty. After the criminal charges against him were dismissed, he sued the City pursuant to 42 U.S.C. § 1983 by naming two city employees in their official capacities only. The City filed a motion for summary judgment after the deadline for completion of discovery had passed. Shaw then moved for leave to file an amended complaint that named the defendants in their individual capacities. The district court denied Shaw's motion for leave to amend and granted summary judgment in favor of the City.

This court's decision in *Lovelace v. O'Hara*, 985 F.2d 847 (6th Cir. 1993), controls the disposition of Shaw's motion for leave to amend. Because the statute of limitations on § 1983 claims had already passed before Shaw attempted to name the defendants in their individual capacities, the amendment would have been permissible only if it "related back" to the date of the original complaint. *See* Fed. R. Civ. P. 15(c). The amendment did not relate back because the original complaint expressly named the defendants in their official capacities only, and therefore did not place them on notice of possible individual liability. *See Lovelace*, 985 F.2d at 850 (denying leave to amend under virtually identical circumstances).

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* The Honorable Richard Mills, United States District Judge for the Central District of Illinois, sitting by designation.

Turning now to the City's summary-judgment motion, Shaw was required to identify a policy of the City that allegedly violated his constitutional rights and to connect that policy with the injury suffered in order to state a cause of action. *Monell v. Dep't of Soc. Servs.*, 436 U.S. 658, 694 (1978); *Ford v. County of Grand Traverse*, 535 F.3d 483, 495 (6th Cir. 2008). Shaw never identified any such policy, nor conducted any discovery on that or any other issue. His attempted amendment following the defendants' motion for summary judgment simply asserted that an offending policy existed, without further explanation. The district court accordingly granted summary judgment in favor of the defendants.

After carefully considering the record on appeal, the briefs of the parties, and the applicable law, we agree with the district court's denial of Shaw's motion for leave to amend and its grant of summary judgment in favor of the City of Columbus. Because the reasoning that supports the judgment for the City has been clearly articulated by the district court in a thorough and comprehensive opinion, the issuance of a detailed appellate opinion would be unduly duplicative. The judgment rendered by the Honorable George C. Smith, District Judge of the United States District Court for the Southern District of Ohio, is accordingly affirmed on the basis of the reasoning detailed in his Opinion and Order filed on September 7, 2006.

## APPENDIX B

**UNITED STATES DISTRICT COURT**
**SOUTHERN DISTRICT OF OHIO**
**EASTERN DIVISION**

**Case No. 2:05-CV-00176**

**[Filed July 25, 2007]**

| | |
|---|---|
| Mark C. Shaw, | ) |
| | ) |
| Plaintiff, | ) |
| | ) |
| -V- | ) |
| | ) |
| Richard C. Pfeiffer, Jr., *et al.*, | ) |
| | ) |
| Defendants. | ) |
| | ) |

JUDGE SMITH
Magistrate Judge Kemp

**ORDER**

Plaintiff has filed a Motion for Reconsideration of the August 8, 2006 Order Denying Leave to Amend Complaint (Doc. 28). Plaintiff seeks to amend his complaint to add a claim of discriminatory termination in violation of Title VII, 42 U.S.C. § 2000e *et seq*. As this Court stated in its Opinion and Order of September 7, 2006 (Doc. 30), Title VII requires a

plaintiff alleging employment discrimination to file a timely charge of discrimination with the EEOC before bringing suit in federal court. This Court recognized, consistent with the decisions of the Ohio Civil Rights Commission ("OCRC") and the Equal Employment Opportunity Commission ("EEOC"), that Plaintiff's charge was untimely filed. (*See* Doc. 30 at 6). Because exhaustion requirements pursuant to Title VII are not jurisdictional prerequisites, and are subject to waiver, estoppel, and equitable tolling (*Zipes v. Trans World Airlines, Inc.*, 455 U.S. 385, 393 (1982)), this Court ordered additional briefing on the Title VII claims, limited to whether or not equitable tolling relief should be granted. (*See* Doc. 30 at 7-8).

The Court has reviewed Plaintiff's Supplemental Memorandum in Support of Equitable Tolling (Doc. 32) and finds that it fails to plead and prove facts supporting equitable avoidance of the timeliness deadline. The only argument that Plaintiff offers is his unsubstantiated opinion that it would have been "unwise" to file a charge of discrimination with the OCRC/EEOC while his criminal prosecution was pending. It is well-settled that equitable tolling relief should be granted only sparingly. *Doan v. NSK Corp.*, 2004 U.S. App. LEXIS 8712 *6 (6th Cir. 2004) (*citing Amtrak v. Morgan*, 536 U.S. 101, 113 (2002)). Plaintiff's "unwise" argument does not amount to "compelling circumstances" that "unavoidably arose from circumstances beyond that litigant's control." *Doan v. NSK Corp.*, 2004 U.S. App. LEXIS 8712 *6 (6th Cir. 2004) (*citing Graham-Humphreys v. Memphis Brooks Museum of Art, Inc.*, 209 F.3d. 552, 560-561 (6th Cir. 2000). Plaintiff has not alleged ignorance of the requirements, and it is apparent from the documents attached to his Supplemental

Memorandum that Plaintiff had counsel. Further, Plaintiff does not argue that Defendants misrepresented the requirements for filing a timely charge of discrimination.

Accordingly, the Court finds that Plaintiff unduly delayed in filing a discrimination charge with the EEOC/OCRC, and he is not entitled to the relief of equitable tolling. Consequently, Plaintiff cannot amend his Complaint to add a claim of discriminatory termination in violation of Title VII.

Based on the foregoing, the Court **DENIES** Plaintiff's Motion for Reconsideration of the August 8, 2006 Order Denying Leave to Amend Complaint (Doc. 28).

The Clerk shall remove Document 28 from the Court's pending motions list.

The Clerk shall remove this case from the Court's pending cases list.

**IT IS SO ORDERED.**

**/s/ George C. Smith**
**GEORGE C. SMITH, JUDGE**
**UNITED STATES DISTRICT COURT**

## APPENDIX C

**UNITED STATES DISTRICT COURT**
**SOUTHERN DISTRICT OF OHIO**
**EASTERN DIVISION**

**Case No. 2:05-CV-00176**

**[Filed November 22, 2006]**

| | |
|---|---|
| Mark C. Shaw, | ) |
| | ) |
| Plaintiff, | ) |
| | ) |
| -V- | ) |
| | ) |
| Richard C. Pfeiffer, Jr., *et al.*, | ) |
| | ) |
| Defendants. | ) |
| | ) |

JUDGE SMITH
Magistrate Judge Kemp

**ORDER**

On September 7, 2006, this Court issued an Opinion and Order (Doc. 30) requesting further briefing from Plaintiff specifically on whether or not equitable tolling relief should be granted. Further, Plaintiff was ordered to file all of the documentation Plaintiff filed with the EEOC forming the basis of any alleged Title VII claim.

All such briefing and documentation must be submitted by December 15, 2006 or the Court will instruct the clerk to enter a final judgment in this case.

**IT IS SO ORDERED.**

***S/ George C. Smith***
**GEORGE C. SMITH, JUDGE**
**UNITED STATES DISTRICT COURT**

## APPENDIX D

**UNITED STATES DISTRICT COURT**
**SOUTHERN DISTRICT OF OHIO**
**EASTERN DIVISION**

**Case No. 2:05-CV-00176**

**[Filed September 7, 2006]**

| | |
|---|---|
| Mark C. Shaw, | ) |
| | ) |
| Plaintiff, | ) |
| | ) |
| -V- | ) |
| | ) |
| Richard C. Pfeiffer, Jr., *et al.*, | ) |
| | ) |
| Defendants. | ) |
| | ) |

JUDGE SMITH
Magistrate Judge Kemp

**OPINION AND ORDER**

Defendants City Attorney Richard C. Pfeiffer, Jr. and Director of Public Safety Mitchell J. Brown, sued in their official capacities only, move for summary judgment as to the entirety of Plaintiff's claims (Doc. 19). Plaintiff has filed a cross motion to file an amended complaint *instanter* (Doc. 24) and a motion for reconsideration of the August 8, 2006 Order

Denying Leave to Amend Complaint (Doc. 28). For the reasons that follow, the Court **GRANTS** Defendants' Summary Judgment Motion (Doc. 19). The Court **DENIES** Plaintiff's Cross Motion to File Amended Complaint *Instanter* (Doc. 24). The Court **DENIES in part** Motion for Reconsideration of the August 8, 2006 Order Denying Leave to Amend Complaint (Doc. 28) insofar as it seeks to assert 42 U.S.C. § 1983 claims against Defendants in their personal capacities and orders further briefing on the Title VII claim.

## I. FACTS

Plaintiff, Mark C. Shaw, is a resident of Franklin County, Ohio and a former employee of the City of Columbus, Ohio Division of Police, having formerly been employed as a Criminalist II with responsibility, *inter alia*, for the conducting of various laboratory analyses including the testing of blood and urine samples for the presence of alcohol and controlled substances.

Defendant Richard C. Pfeiffer, Jr. is the current City Attorney for the City of Columbus. Defendant Mitchell J. Brown is the current Director of the Department of Public Safety for the City of Columbus. Both are sued in their official capacities only.

On April 30, 2001, the Division of Police conducted an administrative hearing in which Plaintiff admitted that he failed to open mail addressed to him that had a direct bearing on the certification of the Crime Lab and also that he failed to inform his supervisor in a timely manner of a phone call from the Ohio Department of Health. Plaintiff alleges he was compelled by Defendants to give testimony at this

hearing that was later utilized in his criminal prosecution in violation of the Fifth and Fourteenth Amendments to the United States Constitution.

On May 9, 2002, the State filed criminal complaints against Plaintiff, each complaint containing a single count charging Plaintiff with a misdemeanor of dereliction of duty in contravention of R.C. § 2921.44(E). More specifically, the complaints alleged:

> Defendant, a public servant, to wit, a public servant employed by the City of Columbus Division of Police Crime Laboratory as a Criminalist II did recklessly fail to perform a duty expressly imposed by law with respect to the public servant's office, to wit: while holding a laboratory technician's/director's permit as described in OAC 3701-53-07(A) did fail to conduct evidential tests of biological fluids for alcohol levels in accordance with the laboratory's written procedure manual in violation of OAC 3701-53-06(C), to wit: reported alcohol level results for blood or urine samples where one or more quality control samples used in testing had a test result more than 5% outside the known for the quality control sample.

Plaintiff's Complaint, Exhibit A. On July 11, 2002, Plaintiff filed a motion to dismiss the criminal charges, arguing that the complaints failed to allege the commission of a crime because the sections of the Ohio Administrative Code cited in the complaints constitute rules or guidelines to run a laboratory, and not duties expressly imposed by law. *See State v. Shaw*, 2003 WL 1962440 (Ohio App. 10 Dist., Apr. 29, 2003). By entry

August 26, 2002, the trial court granted defendants motion to dismiss. *Id.* On appeal, the Franklin County Court of Appeals reversed the lower court, holding that the indictments averred the essential elements of the charged offense. *Id.* The case proceeded to a bench trial. On September 22, 2003, the trial court dismissed the charges. Plaintiff's Complaint, Exhibit D.

On February 24, 2005, Plaintiff filed the instant suit in which he alleges that Defendants, in their official capacities, violated his rights under the Fourth, Fifth, and Fourteenth Amendments of the Constitution. He brings his federal claims under 42 U.S.C. § 1983. Plaintiff also asserts a state law cause of action for negligent infliction of emotional distress and seeks punitive damages.

## II. SUMMARY JUDGMENT STANDARD

The standard governing summary judgment is set forth in Fed. R. Civ. P. 56(c), which provides:

> The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.

Summary judgment will not lie if the dispute about a material fact is genuine; "that is, if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). Summary judgment is appropriate, however, if the opposing party fails to

make a showing sufficient to establish the existence of an element essential to that party's case and on which that party will bear the burden of proof at trial. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986); see also *Matsushita Electric Industrial Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 588 (1986).

When reviewing a summary judgment motion, the Court must draw all reasonable inferences in favor of the nonmoving party, and must refrain from making credibility determinations or weighing the evidence. *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 150-51 (2000).[1] The Court disregards all evidence favorable to the moving party that the jury would not be not required to believe. *Id.* Stated otherwise, the Court must credit evidence favoring the nonmoving party as well as evidence favorable to the moving party that is uncontroverted or unimpeached, if it comes from disinterested witnesses. *Id.*

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[1] *Reeves* involved a motion for judgment as a matter of law made during the course of a trial under Fed. R. Civ. P. 50 rather than a pretrial summary judgment under Fed. R. Civ. P. 56. Nonetheless, standards applied to both kinds of motions are substantially the same. One notable difference, however, is that in ruling on a motion for judgment as a matter of law, the Court, having already heard the evidence admitted in the trial, views the entire record, *Reeves*, 530 U.S. at 150. In contrast, in ruling on a summary judgment motion, the Court will not have heard all of the evidence, and accordingly the non-moving party has the duty to point out those portions of the paper record upon which it relies in asserting a genuine issue of material fact, and the court need not comb the paper record for the benefit of the nonmoving party. *In re Morris*, 260 F.3d 654, 665 (6th Cir. 2001). As such, *Reeves* did not announce a new standard of review for summary judgment motions.

The Sixth Circuit Court of Appeals has recognized that *Liberty Lobby*, *Celotex*, and *Matsushita* have effected "a decided change in summary judgment practice," ushering in a "new era" in summary judgments. *Street v. J.C. Bradford & Co.*, 886 F.2d 1472, 1476 (6th Cir. 1989). The court in *Street* identified a number of important principles applicable in new era summary judgment practice. For example, complex cases and cases involving state of mind issues are not necessarily inappropriate for summary judgment. *Id.* at 1479.

Additionally, in responding to a summary judgment motion, the nonmoving party "cannot rely on the hope that the trier of fact will disbelieve the movant's denial of a disputed fact, but must 'present affirmative evidence in order to defeat a properly supported motion for summary judgment.'" *Id.* (*quoting Liberty Lobby*, 477 U.S. at 257). The nonmoving party must adduce more than a scintilla of evidence to overcome the summary judgment motion. Id. It is not sufficient for the nonmoving party to merely "'show that there is some metaphysical doubt as to the material facts.'" Id. (*quoting Matsushita*, 475 U.S. at 586).

Moreover, "[t]he trial court no longer has a duty to search the entire record to establish that it is bereft of a genuine issue of material fact." Id. at 1479-80. That is, the nonmoving party has an affirmative duty to direct the court's attention to those specific portions of the record upon which it seeks to rely to create a genuine issue of material fact. *In re Morris*, 260 F.3d 654, 665 (6th Cir. 2001).

## III. DISCUSSION

### A. Preliminary Matters

#### 1. Plaintiff's Motion for Reconsideration of August 8, 2006 Order Denying Leave to Amend Complaint

On September 26, 2005, Plaintiff filed a motion for leave to file *instanter* an amended complaint ("September 26, 2005 proposed Amended Complaint") seeking to add a claim for unlawful termination under Title VII of the Civil Rights Act of 1964 (Doc. 11). The reason for the request to file *instanter* is that the motion was filed after the date for filing such motions as established by the preliminary pretrial order. Defendants opposed the motion. The Magistrate Judge's Order denied the leave to amend on the narrow grounds that Plaintiff's tendered amended complaint was fatally defective to the extent it sought a Title VII claim because it failed to allege that Plaintiff filed a charge of discrimination and received a right-to-sue letter (Doc. 27).

Plaintiff has filed a motion for reconsideration of the August 8, 2006 Order Denying Leave to Amend Complaint (Doc. 28). Plaintiff states that it did receive a right to sue letter and sought to add the racial discrimination claim within 90 days of having received this letter. Plaintiff attached Exhibit A, his right to sue letter, to the motion for reconsideration.

Review of Plaintiff's Exhibit A reveals that Plaintiff failed to timely file with the EEOC. Defendants argue that, given that Plaintiff failed to satisfy the administrative prerequisites to filing a Title VII

charge, he will not be able to maintain a Title VII claim as a matter of law, and therefore, Plaintiff's motion to amend his Complaint should be denied on the basis of futility.

To satisfy the prerequisites to an employment discrimination action, a claimant must: (1) file a timely charge of discrimination with the EEOC; and (2) receive and act upon the EEOC's notice of right to sue. *See Puckett v. Tennessee Eastman Co.*, 889 F.2d 1481, 1486 (6th Cir.1989).

As to the first requirement, Title VII requires a plaintiff alleging employment discrimination to file a timely charge of discrimination with the EEOC before bringing suit in federal court. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 798 (1973); *Alexander v. Local 496, Laborers' Int'l Union of N. Am.*, 177 F.3d 394, 407 (6th Cir.1999), *cert. denied*, 528 U.S. 1154 (2000). The applicable statute of limitations begins to run from the date of "the alleged unlawful employment practice." 42 U.S.C. § 2000e-5(e)(1). Title VII has a dual statute of limitations:

> Usually, if the alleged discrimination occurred more than 180 days prior to the plaintiff's filing of an EEOC charge, claims implicating these actions are barred. However, if the alleged unlawful practice occurs in a "deferral state," in this case Ohio, which has enacted its own laws prohibiting discrimination in employment, the plaintiff must file suit within 300 days of the alleged discriminatory act.

*Alexander*, 177 F.3d at 407 (citation omitted). The alleged unlawful employment practices in this case

occurred in Ohio, a deferral state, and thus the 300-day period in which to file an EEOC charge under Title VII applies if the charge is filed with the OCRC. *Id.* Thus, to exhaust administrative remedies, the plaintiffs must have filed an EEOC charge within 180 days of the alleged discrimination, or with the state agency within 300 days. *See Parry v. Mohawk Motors of Mich., Inc.*, 236 F.3d 299, 309 (6th Cir. 2000), *cert. denied*, 533 U.S. 951 (2001).

After a charge of discrimination is filed, the EEOC must investigate the complaint in order to determine whether there is "reasonable cause to believe that the charge is true." 42 U.S.C. § 2000e-5(b). If the EEOC determines that the complaint has a reasonable basis, it will issue a right-to-sue letter to the plaintiff. 29 C.F.R. § 1601.28(b). If the EEOC does not issue a right-to- sue letter within 180 days after the charge of discrimination is filed, the plaintiff may request such a letter. 29 C.F.R. § 1601.28(a). A person must possess a right-to-sue letter from the EEOC in order to file suit under Title VII. *EEOC v. Frank's Nursery & Crafts, Inc.*, 177 F.3d 448, 456 (6th Cir.1999).

Nevertheless, the Court's inquiry does not end here. Because exhaustion requirements pursuant to Title VII are not jurisdictional prerequisites, they are subject to waiver, estoppel, and equitable tolling. *Zipes v. Trans World Airlines, Inc.*, 455 U.S. 385, 393 (1982); *McFarland v. Henderson*, 307 F.3d 402, 406 (6th Cir. 2002). Equitable tolling relief should be granted only sparingly. *Graham-Humphreys v. Memphis Brooks Museum of Art, Inc.*, 209 F.3d 552, 560 (6th Cir. 2000). In determining whether the equitable tolling of the EEOC filing period is appropriate in a given case, the following five factors, among others, may apply:

1) lack of notice of the filing requirement;

2) lack of constructive knowledge of the filing requirement;

3) diligence in pursuing one's rights;

4) absence of prejudice to the defendant; and

5) the plaintiff's reasonableness in remaining ignorant of the particular legal requirement for filing his claim.

*Truitt v. County of Wayne*, 148 F.3d 644, 648 (6th Cir. 1998).

In the instant case, Plaintiff failed to timely file with the EEOC. It is the burden of the employee in such an instance to plead and prove facts supporting equitable avoidance of a timeliness deadline. *Hampton v. Caldera*, 58 Fed.Appx. 158, 160 (6th Cir. 2003) *citing Bowden v. United States*, 106 F.3d 433, 437 (D.C.Cir. 1997). Thus, in the instant case, the burden of demonstrating the applicability of equitable tolling relief lies with Plaintiff. Accordingly, the Court orders additional briefing on the Title VII claims. Briefing is limited to whether or not equitable tolling relief should be granted.

**2. Plaintiff's Cross-Motion to File an Amended Complaint *Instanter***

On March 20, 2006, Plaintiff, in his memorandum in opposition to Defendants' Motion for Summary Judgment, filed a cross-motion to file an amended complaint *instanter* (Doc. 24). The proposed amended

complaint filed with this motion ("March 20, 2006 proposed Amended Complaint") is different than the September 26, 2005 proposed Amended Complaint discussed *supra*. While both of the proposed amended complaints seek to add a claim for unlawful termination under Title VII of the Civil Rights Act of 1964[2], the March 20, 2006 proposed Amended Complaint seeks, for the first time, to name Defendants in their personal capacities as to Plaintiff's § 1983 claims. Defendants oppose this motion. Plaintiff claims the amendments are a function of further investigation and discussions concerning the basis for Plaintiff's claims and a response to Defendant's summary judgment motion.

Defendants argue that Plaintiff fails to demonstrate "good cause" for amending his complaint nine months after the deadline for filing motions for leave to amend set forth in the pretrial order and after the Defendants' filing of a motion for summary judgment.[3] Defendants further argue that, as a matter

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[2] Just as with the September 26, 2005 proposed Amended Complaint, this proposed amended complaint is also fatally defective to the extent it seeks to add a Title VII claim because it too fails to allege that Plaintiff filed a charge of discrimination and received a right-to-sue letter. However, in light of Exhibit A to Plaintiff's Motion for Reconsideration of the August 8, 2006 Order Denying Leave to Amend Complaint, the Court refers the parties to Its discussion in III.A.1, *supra*.

[3] Defendants note that Plaintiff does not offer what information he has allegedly obtained as of March 20, 2006 that he did not know or could not have asserted. Defendants further point out that it is undisputed that Plaintiff has conducted no formal discovery and has never served written discovery requests or requested any depositions. The Court recognizes that there is no apparent

of law, Defendants would be prejudiced if Plaintiff were permitted to allege § 1983 claims against them in their personal capacities. Finally, Defendants assert that allowing Plaintiff to amend to add these § 1983 personal capacity claims would be futile because the applicable statute of limitations bar these claims.

The Court may deny a party leave to file an amended pleading if the pleading would be an exercise in futility. *Robinson v. Michigan Consolidated Gas Co.*, 918 F.2d 579 (6th Cir. 1990). The March 20, 2006 proposed Amended Complaint seeks to add § 1983 claims against Defendants in their personal capacities. The statute of limitations for § 1983 claims is two years. *Banks v. city of Whitehall*, 344 F.3d 550 (6th Cir. 2003), relying on *Browning v. Pendleton*, 869 F.2d 989 (6th Cir. 1989). The criminal charges against Plaintiff were dismissed on September 23, 2003. Thus, the two-year limitations period for Plaintiff's alleged § 1983 claims expired, at the latest, on September 23, 2005 or six months before the filing of the March 20, 2006 proposed Amended Complaint.

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justification for Plaintiff's delay and that a defendant is significantly prejudiced when a plaintiff seeks to amend his complaint after the close of discovery and the filing of dispositive motions. *See Duggins v. Steak 'n Shake, Inc.*, 195 F.3d 828 (6th Cir. 1999); *Tucker v. Union of Needletrades, Industrial and Textile Employees*, 407 F.3d 784 (6th Cir. 2005). However, because the Court finds that the requested amendment would be futile given that the statute of limitations for Plaintiff's § 1983 claims has expired, the Court does not address Defendants' argument that Plaintiff failed to make a showing of "good cause" to amend the complaint.

To amend a complaint after the statute of limitations has tolled, a plaintiff must show that the amendment "relates back" to the original complaint. Federal Rule 15(c) provides in pertinent part:

An amendment of a pleading relates back to the date of the original pleading when:

1. relation back is permitted by the law that provides the statute of limitations applicable to the action, or
2. The claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set for or attempted to be set forth in the original pleading , or
3. The amendment changes the party or the naming of the party against whom a claim is asserted if the foregoing provision (2) is satisfied and, within the period provided by Rule 4(j) for service of the summons and complaint, the party to be brought in by amendment (A) has received notice of the institution of the action that the party will not be prejudiced in maintaining a defense on the merits, and (B) knew or should have known that, but for a mistake concerning the identity of the proper party, the action would have been brought against the party.

In the instant case, Plaintiff, in his original complaint, filed February 24, 2005, stated unequivocally that the defendants were being sued in their official capacities. (Compl. ¶¶ 2,3). He expressly alleged "the acts complained of in this action were undertaken by [Defendants] not in their capacity as

individuals . . . ." (Compl. ¶ 6). The September 26, 2005 proposed Amended Complaint contained these identical allegations. Plaintiff admits that these pleadings sought only the hold the City of Columbus liable. Plaintiff's Memo in Opp. at 2. The at-issue March 20, 2006 proposed Amended Complaint does not add any factual allegations, but instead merely adds "personal capacity" to Paragraphs 2 and 3 and changes Paragraph 6 to allege that Defendants were acting as "individuals" and as "officials."

Defendants assert, and the Court agrees, that *Lovelace v. O'Hara*, 985 F.2d 847 (6th Cir. 1993) governs the instant case. In *Lovelace*, the Sixth Circuit considered whether the trial court properly permitted plaintiff to amend her complaint to add a § 1983 personal capacity claim against a defendant after the statute of limitations for § 1983 claims had expired and where the original complaint stated that the defendant was not acting as an individual, but rather in his official capacity only. The *Lovelace* Court stated that Fed.R.Civ.P. 15(c)(3) addresses these circumstances. *Id.* at The Sixth Circuit noted that while there is no question the original and amended complaints involve the same conduct, as a matter of law, the defendant did not have notice he was being sued individually because the original complaint contained a statement that defendant acted not as an individual, but in his official capacity. *Id.*

In reaching its conclusion, the *Lovelace* Court recognized Sixth Circuit precedent in *Wells v. Brown*, 891 F.2d 591 (6th Cir. 1989), to wit:

> The face of a complaint must indicate whether a plaintiff seeks to recover damages from

> defendants directly, or to hold the state responsible for the conduct of its employees. Although modern pleading is less rigid than in an earlier day, we have not let down all pleading barriers. It is not too much to ask that if a person or entity is to be subject to suit, the person or entity should be properly named and clearly notified of the potential for payment of damages individually.

*Id.* at 850 *citing Wells* at 593.

The Sixth Circuit concluded that the *Lovelace* trial court erred in granting plaintiff leave to amend to name defendant in his personal capacity after the § 1983 statute of limitations had expired. The Sixth Circuit explained that the original complaint clearly intended to hold the state responsible for the plaintiff's actions and that defendant had no reason to believe that he would be personally liable or that personal assets were at state. *Id.* The Court further explained

> . . . the distinction between an official capacity and an individual capacity suit is significant . . . . An amendment in a defendant's capacity in a lawsuit under 42 U.S.C. § 1983 alters the elements of recovery and defense and requires major changes in pleading, discovery, trial preparation and selection and location of witnesses to testify at trial.

*Id.* (internal citations ommitted).

Just as in *Lovelace*, Plaintiff's original complaint (and the September 26, 2005 proposed Amended Complaint) evidences an intentional choice by Plaintiff to bring an official capacity suit only. On its face,

Plaintiff's original complaint is not ambiguous. Moreover, Plaintiff, in his memo in opposition, admits it was his intent to sue defendants in their official capacities only. As the Sixth Circuit has found, "[w]ith such a clear statement in the pleadings, [the defendant] had no reason to believe that he was being sued in a personal capacity or that but for a mistake in identity, the suit would have been against him personally. Thus, the amended complaint fails to meet the criteria for relation back as set forth in Fed.R.Civ.P. 15(c)(3)." *Id.* Consequently, the Court finds that the requested amendment would be futile given that the statute of limitations for Plaintiff's § 1983 claims has expired and therefore denies Plaintiff's Cross-Motion for Leave to File an Amended Complaint *Instanter* (Doc. 28).

**B. Federal Claims**

As a preliminary matter, Plaintiff has asserted claims against Richard C. Pfeiffer, the current City Attorney for the City of Columbus, and Mitchell J. Brown, the current Director of the Department of Public Safety for the City of Columbus, naming each individual solely in their official capacities. Defendants contend, and the Court agrees, that because Plaintiff failed to make any specific allegation against any of the Defendants in their individual capacity, the action is only against the City. *See Pusey v. Cty of Youngstown*, 11 F.3d 652, 657 (6th Cir. 1993) ("A suit against a person in his or her official capacity is a suit against the office and no the person."). Thus, the Court views the instant claims as claims made against the City of Columbus.

42 U.S.C. § 1983 accords a remedy against "any person" who, under color of state law, deprives another of rights protected by the United States Constitution. Municipalities and other local government entities are deemed persons under § 1983. *Monell v. Depart. of Social Services*, 436 U.S. 658, 690 (1978). Notwithstanding:

> Congress did not intend municipalities to be held liable unless action pursuant to official; municipal policy of some nature caused a constitutional tort. In particular, we conclude that a municipality cannot be liable *solely* because it employs a tortfeaser – or, in other words, a municipality cannot be held liable under § 1983 on a *respondeat superior* theory.

*Id.* at 691; *see also Culberson v. Doan*, 125 F.Supp. 252, 272 (S.D. Ohio 2000) (holding that a municipality cannot be held liable under 42 U.S.C. § 1983 for its employee's conduct on the basis of *respondeat superior*). The *Monell* Court further stated:

> [A] local government may not be sued under § 1983 for an injury inflicted solely by its employees or agents. Instead, it is when execution of a government's policy or custom, whether made by its lawmakers or by those edicts or acts may fairly be said to represent official policy, inflicts that the government as an entity is responsible under § 1983.

436 U.S. at 693.

Since the doctrine of *respondeat superior* is inapplicable, the city or municipality is only liable

when the city itself is the wrongdoer. *Collins v. City of Harker Heights Tex.*, 503 U.S. 115, 122 (1992). Therefore, in the instant case, the City of Columbus must have caused the constitutional violations asserted by Plaintiff through an execution of a governmental policy or custom. The Sixth Circuit has stated that to satisfy the *Monell* requirements, a plaintiff must "identify the policy, connect the policy to the city itself and show that the particular injury was incurred because of the execution of that policy." *Coogan v. City of Wixom*, 820 F.2d 170 (6th Cir. 1987).

In the instant case, Defendants argue that Plaintiff has failed to allege any policy or custom of the City of Columbus that resulted in the violation of his constitutional rights. The Court agrees. As Defendants point out, Plaintiff's claims concern only the circumstances of his own prosecution. Plaintiff's assertion that his prosecution was "wrongful and malicious" does not constitute an articulation of a policy, custom or practice on the part of the City. The City asserts that it has no policy, custom or practice that violates the Constitution and Plaintiff has failed to provide any articulation or evidence to the contrary. Accordingly, Defendants' Motion for Summary Judgment is hereby granted.

**C. State Law Claims**

The Court has granted Defendants' Motion for Summary Judgment on Plaintiff's federal claims. The Court therefore declines to exercise supplemental jurisdiction over Plaintiff's state law claims. It is well settled that a District Court may decline to exercise supplemental jurisdiction over state-law claims once it has dismissed all claims over which it possessed

original jurisdiction. *Saglioccolo v. Eagle Ins. Co.*, 112 F.3d 226, 233 (6th Cir. 1997). Indeed, the Sixth Circuit has recognized that if all federal claims are dismissed before trial, remaining state claims generally should be dismissed. *Id.*; *Taylor v. First of Am. Bank-Wayne*, 973 F.2d 1284, 1287 (6th Cir. 1992). Therefore, pursuant to 28 U.S.C. § 1367(c)(3) and (d), the Court will dismiss Plaintiff's state law claims against Defendants without prejudice.

## V. CONCLUSION

Based on the above, the Court **GRANTS** Defendants' Summary Judgment Motion (Doc. 19). The Court **DENIES** Plaintiff's Cross Motion to File Amended Complaint *Instanter* (Doc. 24). The Court **DENIES in part** Motion for Reconsideration of the August 8, 2006 Order Denying Leave to Amend Complaint (Doc. 28) insofar as it seeks to assert 42 U.S.C. § 1983 claims against Defendants in their personal capacities and orders further briefing on the Title VII claim. The Court requests further briefing specifically on whether or not equitable tolling relief should be granted. Further, Plaintiffs are ordered to file all of the documentation filed with the EEOC forming the basis of any alleged Title VII claim.

Though all pending claims are dismissed, the Court orders the Clerk to refrain from entering a final judgment in this case pending the resolution Motion to file *Instanter* Complaint and the Motion for Reconsideration (Doc. 28).

The Clerk shall remove Documents 19 and 24 from the Court's pending motions list.

**IT IS SO ORDERED.**

**s/ George C. Smith**
**GEORGE C. SMITH, JUDGE**
**UNITED STATES DISTRICT COURT**

## APPENDIX E

**UNITED STATES COURT OF APPEALS**
**FOR THE SIXTH CIRCUIT**

**No. 07-3997**

**[Filed October 15, 2008]**

| | |
|---|---|
| MARK C. SHAW, | ) |
| | ) |
| Plaintiff-Appellant, | ) |
| | ) |
| v. | ) |
| | ) |
| RICHARD C. PFEIFFER, Jr.; MITCHELL J. BROWN, | ) |
| | ) |
| Defendants-Appellees. | ) |

### ORDER

BEFORE: DAUGHTREY and GILMAN, Circuit Judges; and MILLS, U.S. District Judge.*

Upon consideration of the petition for rehearing filed by the appellant,

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* The Honorable Richard Mills, United States District Judge for the Central District of Illinois, sitting by designation.

It is **ORDERED** that the petition for rehearing be, and it hereby is, **DENIED**.

**ENTERED BY ORDER OF THE COURT**
Leonard Green, Clerk

Issued: October 15, 2008 /s/

## APPENDIX F

**UNITED STATES DISTRICT COURT**
**FOR THE SOUTHERN DISTRICT OF OHIO**

**CASE NO. 2:05-CV-176**

**[Filed July 26, 2007]**

| | |
|---|---|
| Mark C. Shaw<br>477 Tuttle's Woods Drive<br>Dublin, Ohio 43016 | ) |
| Plaintiff, | ) |
| vs. | ) |
| Richard C. Pfeiffer, Jr.<br>Columbus City Attorney<br>90 W. Broad Street, Ste. 200<br>Columbus, OH 43215<br>Mitchell J. Brown Safety Director,<br>City of Columbus<br>50 W. Gay St., Columbus, OH 43215 | ) |
| Defendants. | ) |

## NOTICE OF APPEAL

Notice is hereby given that Plaintiff Mark C. Shaw, hereby appeal to the United States Court of Appeals for the Sixth Circuit from Judgment in a Civil Case

pursuant to the Order dated July 25, 2007 entered in this action on the 26th day of July, 07.

(s) /s/_____
Percy Squire
Address: 514 South High St.
Columbus, OH 43215
Attorney for: Plaintiff

6CA-3
1/99

## APPENDIX G

**UNITED STATES COURT OF APPEALS**
FOR THE SIXTH CIRCUIT
100 EAST FIFTH STREET, ROOM 540
POTTER STEWART U.S. COURTHOUSE
CINCINNATI, OHIO 45202-3988

Leonard Green
Clerk

Tel. (513) 564-7000
www.ca6.uscourts.gov

Filed: October 28, 2008

Mr. James Bonini
Southern District of Ohio at Columbus
85 Marconi Boulevard
Suite 260 US. Courthouse
Columbus, OH 43215-0000

Re: Case No. 07-3997, *Shaw v. Pfeiffer, et al*
Originating Case No.: 05-00176

Dear Clerk,

Enclosed is a copy of the mandate filed in this case.

Sincerely yours,

s/Florence P. Ebert
Case Manager
Direct Dial No. 513-564-7026
Fax No. 513-564-7098

cc: Ms. Paula J. Lloyd
Mr. Percy Squire

Enclosure

**UNITED STATES COURT OF APPEALS**
**FOR THE SIXTH CIRCUIT**

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**No: 07-3997**

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Filed: October 28, 2008

MARK C. SHAW,

Plaintiff - Appellant

v.

RICHARD C. PFEIFFER, Jr.;
MITCHELL J. BROWN,

Defendants - Appellees

MANDATE

Pursuant to the court's disposition that was filed 09/23/2008 the mandate for this case hereby issues today.

COSTS: NONE

Filing Fee.....$
Printing .....$
Total.....$